Supreme Court, U.S.
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No. 89-161

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

RICH'S BETTER GREASE SERVICE, INC., a corporation,
Petitioner.

v.

BRENDA K. VENTURINO, JAMES L. VENTURINO, RAYCHELL ESTEP COLEMAN and PHILLIP BRIAN COLEMAN, Individually and as Administrator of the Estate of Phillip Daniel Coleman, deceased, and STATE FARM INSURANCE COMPANY,
Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the District Court abused its discretion by prohibiting defense counsel from calling as his own witness, respondents' non-witness expert retained in anticipation of litigation.

PARTIES TO THE ACTION

Counsel for the respondents agrees with the listing of all parties contained at page 1a of the Petition for Writ of Certiorari.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears at page 20a of the Appendix attached to the Petition For Writ of Certiorari. The opinion of the United States District Court for the Southern District of West Virginia appears at page 1a of the Appendix attached to the Petition for Writ of Certiorari.

JURISDICTION

Counsel for the respondents agrees with the statement of jurisdiction contained in the Petition for Writ of Certiorari.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Counsel for the respondents agrees with the statement of the Federal Rule of Civil Procedure Involved contained in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Counsel for the respondents generally agrees with the Petition's statement of the case below. However, the statement of the case by the petitioner fails to mention: 1) that Jack Brewster, the State Farm claims investigator, stated in an uncontroverted affidavit that the accident reconstruction expert, Greg Manning, was hired by State Farm in anticipation of litigation; 2) that the District Court made a finding that Mr. Manning was hired in anticipation of litigation by State Farm, which was a party plaintiff to the extent of its subrogation claim;[1] and 3) that there is no evidence in the record contrary to the District Court's finding.

The petitioner's statement of the case also fails to mention that Mr. Manning was never identified by counsel for the petitioner as a potential witness during the course of discovery before trial. The petitioner identified no expert witnesses in its answers to expert witness interrogatories. The petitioner did not serve any interrogatories upon counsel for the respondents requesting the identifica-

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[1] As a matter of West Virginia law, State Farm was a real party in interest to the extent of its subrogration claim and it was not necessary for them to be a named party in order for the subrogation claim to be asserted. *See, Capitol Fuels, Inc. v. Clark Equipment Company*, 342 S.E.2d 245 (WV 1986). State Farm was named a party before trial on the petitioner's motion.

tion of expert witnesses the respondents intended to use at trial.

Counsel for the petitioner had not identified any experts at the time the discovery cut-off occurred before trial. The only discovery undertaken by counsel for the petitioner before the discovery cut-off was the discovery depositions of Mrs. Venturino and Mrs. Coleman and their spouses. Counsel for the petitioner did not hire its own expert during the 1½ years this case was pending for trial. Even when the pretrial order was submitted to the Court for entry, no expert witnesses had been identified by counsel for the petitioner. It was not until three weeks before trial that defense counsel filed a notice to take the deposition of Mr. Manning.

Finally, there is no basis in the record for counsel for the petitioner's contention that Mr. Manning's opinion would support (or refute) the defendant's position below regarding the cause of the automobile accident. Mr. Manning, who was outside the jurisdiction of the District Court, was never properly served with a subpoena for appearance at trial, and counsel for the petitioner did not attempt to vouch the record with respect to Mr. Manning's testimony nor State Farm's decision to hire Mr. Manning.

SUMMARY OF ARGUMENT

The District Court properly prohibited the deposition of Mr. Manning pursuant to Rule 26(b)(4)(B). The uncontroverted evidence below was that Mr. Manning was an expert hired in anticipation of litigation by State Farm, a party plaintiff to the extent of its subrogation claim, and that the plaintiffs did not intend to use Mr. Manning as a witness at trial. The District Court made a specific finding that this was the case. There was no showing made of any exceptional circumstances why defense counsel could not obtain similar facts or opinions by other means, and accordingly, the deposition of

Mr. Manning was properly prohibited under Rule 26(b)(4)(B).

The District Court's ruling prohibiting defense counsel from calling Mr. Manning as a witness at trial was well within the Court's discretion, given the posture of the petitioner's untimely attempts to use Mr. Manning. Neither the District Court nor the Fourth Circuit has interpreted Rule 26(b)(4)(B) to contain a broad proscription against calling witnesses who could not have been deposed under the Rule. Given the petitioner's failure to divulge its intention to use Mr. Manning as a witness during the discovery period and the failure of the petitioner to divulge Mr. Manning as a witness in the pretrial order, there can be no question that the District Court properly denied the petitioner's last minute attempts to use the respondents' non-witness expert as a witness at trial.

The petitioner has not made the showing of special and important reasons for granting a writ of certiorari required by Rule 17. The decision of the Fourth Circuit is not in conflict with the decision of any other Federal Court of Appeals on the question presented, nor has there been any showing that the Fourth Circuit has departed from the accepted and usual course of judicial proceedings so as to call for an exercise by the United States Supreme Court of its power of supervision. Further, no important question of federal law arises from the record that needs to be settled by this Court

ARGUMENT

I. THE DISTRICT COURT PROPERLY PROHIBITED THE DEPOSITION OF THE RESPONDENTS' NON-WITNESS EXPERT HIRED IN ANTICIPATION OF LITIGATION UNDER RULE 26(b)(4)(B).

The *uncontroverted* evidence below showed that the accident reconstruction expert, Greg Manning, was hired in anticipation of litigation by State Farm Insurance, which was a party in the litigation to the extent of its subrogation claim. The District Court made specific findings in this regard in ruling on the respondents' motion to quash Mr. Manning's deposition. There was no evidence to the contrary presented by counsel for the petitioner. Accordingly, it was clearly appropriate for the District Court to apply Rule 26(b)(4)(B) to prohibit the deposition of Mr. Manning, absent the showing of exceptional circumstances required by the Rule. The petitioner made no attempt whatsoever below to show that exceptional circumstances existed that would justify the taking of Mr. Manning's deposition. This was noted by the Court of Appeals in its opinion. (*See*, Petition at p. 23a) Accordingly, there can be no question that the District Court properly prohibited Mr. Manning's deposition. As the Court of Appeals stated:

> [T]he district court correctly ruled that State Farm was a party. In addition, the district court made adequately supported findings that Manning was hired in anticipation of litigation and that State Farm never intended to call Manning as a witness. Finally, as we have previously stated, defendant has not carried its burden in showing that the exceptional circumstances exception in Rule 26(b)(4)(B) is applicable. Accordingly, we conclude that the district court was correct in ruling that rule 26(b)(4)(B) barred defendant's deposition of Manning.

(*See* Petition at p. 26a.)

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY PROHIBITING DEFENSE COUNSEL'S LAST MINUTE ATTEMPTS TO CALL AS HIS OWN WITNESS RESPONDENTS' NON-WITNESS EXPERT RETAINED IN ANTICIPATION OF LITIGATION.

A short review of the course of discovery prior to trial helps to place the District Court's decision to refuse defense counsel's last minute attempts to depose or use plaintiffs' non-witness expert in proper prospective. The accident in this case happened on February 20, 1985. Suit was filed in the District Court on July 7, 1986. Plaintiffs served interrogatories on the defendant on August 12, 1986, requesting that the defendant identify its experts. The interrogatories went unanswered and in September 1986, plaintiffs filed a motion to compel defendant to answer the interrogatories. By order of October 30, 1986, the Court ordered the defendant to answer the interrogatories.

Despite the Court's order, the defendant still did not answer the plaintiffs' interrogatories and a motion was made for sanctions on November 7, 1986. Pursuant to a hearing on this motion, an agreement was reached between counsel that the defendant would answer the interrogatories. This was done on November 19, 1986. In the defendant's interrogatory answers, it was indicated that no determination had been made by defendant to retain any expert witnesses.

By January 1987, defense counsel had not supplemented his answers to the expert witness interrogatories. Counsel for plaintiffs sent a letter to defense counsel at that time reminding him that he had not identified any experts and asked defense counsel to supplement his answers to interrogatories with respect to expert witnesses. There was no reply by defense counsel.

On July 6, 1987, the discovery period was closed pursuant to the Time Frame Order previously entered by

the District Court. At the time the discovery cut-off occurred, defense counsel had not identified any expert witnesses. Further, defense counsel had not sent any interrogatories to counsel for plaintiffs inquiring of experts the plaintiffs intended to call at trial.

A pretrial order, which, pursuant to the District Court's Time Frame Order requires the identification of all trial witnesses, was submitted to the Court for entry on August 19, 1987. The defendant failed to identify any experts in the pretrial order whch it intended to call as witnesses at trial. However, defense counsel, for the first time, did indicate in the pretrial order that he would call as a witness at trial an "accident reconstruction expert to be named at a later date". Less than three weeks before the trial scheduled for October 6, 1987, defense counsel filed a notice to take the deposition of Mr. Greg Manning. The plaintiffs' objected to the deposition as untimely and further filed a motion for a protective order on grounds that Mr. Manning was an expert hired by a party in anticipation of litigation, who was not going to be called as a witness at trial, and therefore, was protected by Rule 26(b)(4)(B). A hearing was held on this motion on September 18, 1987. The District Court recognized that State Farm Insurance Company was a party plaintiff to the extent of its subrogation claim under West Virginia law, and the Court made a finding that Mr. Manning was an expert hired in anticipation of litigation by State Farm, based upon the uncontroverted affidavit of Jack Brewster, the State Farm claims representative.[2]

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[2] The Courts in *Marine Petroleum Co. v. Champlin Petroleum Co.*, 641 F.2d 984 (D.C. Cir. 1980), and *Seiffer v. Topsy's International, Inc.*, 69 F.R.D. 69 (D. Kan. 1975), both relied on uncontroverted affidavits to establish that a non-witness expert was hired in anticipation of litigation. The question of whether an expert was hired in anticipation of litigation is a question of fact for the District Court in the first instance. *Healy v. Counts*, 100 F.R.D. 493 (D. Colo. 1984).

The District Court accordingly ruled that Mr. Manning was an expert protected under Rule 26(b)(4)(B) and the defendant had failed to make any showing of exceptional circumstances why it could not obtain its own accident reconstruction expert or obtain similar facts and opinions by other means. Following this ruling, counsel for the defendant for the first time announced his intention to call Mr. Manning as a witness at trial.

As can be seen by this review of the discovery below, the petitioner failed to hire an accident reconstruction specialist of its own during the 1½ years this case was pending for trial and failed to inquire in any manner with regard to the experts the respondents intended to use at trial. It was only at the last minute, on the eve of trial, that defense counsel attempted to take the deposition of the non-witness expert previously hired in anticipation of litigation by State Farm, which was a party plaintiff and was represented at trial by respondents' counsel. In these circumstances, one can understand the trial court's characterization of defense counsel attempts to use Mr. Manning as "dirty pool". (*See* transcript of hearing 9/18/87 at p. 9) Defense counsel had every right to hire an accident reconstruction expert of his own to testify at trial and simply failed to do so.

Neither the District Court nor the Fourth Circuit Court of Appeals has interpreted Rule 26(b)(4)(B) as a broad prohibition against the calling of witnesses who could not be deposed under the Rule. The District Court's decision to refuse defense counsel's attempt to call Mr. Manning as a witness at trial is justified based solely on the fact that Mr. Manning was never disclosed as a witness by defense counsel throughout the course of discovery, and indeed, was not listed as a witness in the pretrial order. Federal district court's have broad discretion to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial and within this discretion lies the power to exclude or admit expert testimony and to exclude testimony of witnesses

whose use at trial is in bad faith or would unfairly prejudice an opposing party. *See, e.g., Marine Petroleum Company v. Champlin Petroleum Co.*, 641 F.2d 984 (D.C. Cir. 1980); *Campbell Industries v. M/V Gemini*, 619 F.2d 24 (9th Cir. 1980).

III. THE PETITIONER HAS NOT MADE THE SHOWING OF SPECIAL AND IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI REQUIRED BY RULE 17.

The petitioner has not demonstrated any special and important reasons why this Court should exercise its discretion to review the decision below on Writ of Certiorari. The decision of the Fourth Circuit Court of Appeals is not in conflict with the decision of any other Federal Court of Appeals or in conflict with the decision of a State Court of last resort. Neither has the petitioner demonstrated that the decision of the Fourth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for the exercise of this Court's power of supervision.

Neither has the petitioner demonstrated that the Fourth Circuit Court of Appeals has decided an important question of Federal law which has not been settled by this Court, or is in conflict with the decision of this Court. The Fourth Circuit's decision has not construed Rule 26(b)(4)(B) as a broad proscription against calling witnesses who could not have been deposed under the Rule. The Court of Appeals merely decided the District Court did not abuse its discretion under all the facts of this case in ruling that the defendant could not call Mr. Manning to testify at trial. There is no important federal question raised by the Fourth Circuit's opinion; neither does that opinion conflict with any decision of any other Circuit Court or State Court of last resort, and accordingly, review on Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, the respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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